

## Insolvency

### Creditor Voting Rights for Unpaid Superannuation

The situation: A Company has unpaid Superannuation Guarantee Charge (**SGC**) owed to the Australian Taxation Office (**ATO**). The Company is placed into voluntary administration. At the meeting of the creditors, there is a proposal for the Company to enter into a Deed of Company Arrangement (**DoCA**). The directors and employees support the proposed DoCA, the ATO does not. The ATO submits an estimate of the unpaid SGC for proof and the employees submit a proof for their contractual superannuation entitlements. It raises the question, what does the administrator do on the question of voting rights?

The rule against double proof means that only one proof can be admitted against a particular debt that arises from the same liability (*Western Australia v Bond Corp Holdings* (1992) 37 FCR 150) (**Bond Corp Holdings**). So do the SGC and the employees contractual superannuation entitlements arise from the same liability.

In *Master Painters Association of Victoria Ltd, Re: Deputy Commissioner of Taxation v Rathner* (2004) 211 ALR 316 (**Master Painters**), the administrator had partially rejected a proof submitted by the Deputy Commissioner of Taxation to the extent that that it related to the SGC. The administrator argued that he was entitled to reject the proof on the basis of the rule against double proof. The Victorian Supreme Court held that there was no double proof as the Company had paid the contractual superannuation entitlements of the employees. Thus the SGC proof was admissible and there were no competing claims for the same liability. Importantly, the Court made observations as to the characterisation of the SGC proof.

The Court observed that the SGC arose from the *Superannuation Guarantee (Administration) Act 1992* (Cth), whereas the employee entitlements were contractual. The Court further observed that the SGC obligations can arise whether or not there is a contractual superannuation entitlement, and stated: *“Concededly, that contractual obligation [to pay Super] is not the “same” debt as the superannuation guarantee charge liability (in whole or in part)”*.

Although the above comments were not determinative of the issue before the Court, they give strong weight to the view that the SGC liability of a company to the ATO is a separate liability to that of the company to its employees for their superannuation entitlements.

Arguably an administrator should not be called upon to make complicated determinations in relation to such issues of double proof at the early voting stage. Indeed the Court in *Bond Corp Holdings* stated that complicated issues of double proof are to be examined at the point at which any dividend is actually about to be paid. However, administrators will commonly face the issue of whether to admit to the ATO's SGC proof and the employees' contractual super entitlements proof at the voting stage for any DoCA.

The comments of the Court in *Master Painters* provide guidance as to how the liabilities should be treated and how an administrator should respond in relation to potentially competing proofs. Once the Company enters into a DoCA or goes into liquidation, sections 444DB and 553AB of the *Corporations Act 2001* (Cth) require in effect that the Deed Administrator or Liquidator must reject the employee's proof if a competing SGC proof exists. However, at the administration and voting stage, there is no statutory prohibition against admitting employee's contractual superannuation entitlements for the purposes of voting rights. In that situation it can make all the difference. The team at Roe Legal Services can provide assistance and guidance on this issue which can often be critical when voting for a DoCA proceeds.

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### Recent Engagements

Roe Legal Services has recently been engaged in relation to:

- the pursuit of a claim regarding the acquisition of a commercial shipping vessel;
- the preparation of various DoCA's for construction, property and transportation industry participants;
- defence of significant claims in relation to alleged breaches of confidential information;
- section 596 examinations; and
- disputation over the proceeds of sale of a franchise business in the insolvency context.

### Roe Legal Services pursues Strike-Out Claim Success

Roe Legal Services recently won a complicated procedural argument striking out the defences raised in a significant claim regarding the sale of a commercial property to our client in circumstances where environmental constraints were allegedly not disclosed to our client. The matter is subject to appeal.

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## Indigenous Law

### No Soup for You!

You hear stories about the overly litigious lawyers in the US and hope that they are stereotypes, but they keep coming up with more. In April this year, a Texas lawyer, Dwain Downing ordered the special at a local restaurant which came with a free soup. After placing his order, he was told that they had run out of soup. Downing asked for his meal to be discounted, or to receive free food, and the manager said that that was not the restaurant's policy.

So Downing did the next logical thing, send a letter of demand to the restaurant. His legal argument was outlined in the letter, "The menu is an offer of contract by you. I accepted the offer. This action by you and I created a legally binding contract which is legally enforceable in the court of law. You then breached the contract by not providing the soup as promised by you on the menu."

Downing demanded that the restaurant change their policy, and claimed \$2.25 in damages for the loss of soup and his own hourly rate in legal fees for writing the letter of \$250. The letter further claimed that if his demands were not met in 10 days, he would sue the restaurant.

Naturally, the restaurant has put the letter up on their Facebook page, and it has exploded all across the internet, with dozens of news articles, hundreds of comments on Mr Downing's social media pages with angry messages and millions of people exposed to the story.

When asked to comment by the Star-Telegram newspaper, Mr Downing said "I don't want to make a big deal out of this". ..... Oops. Mr Downing has since withdrawn the demand.

### Appointment of Senior Associate

Roe Legal Services wish to announce the appointment of Mihiarangi Piripi as Senior Associate.

Mihi joined Roe Legal Services in 2013. Originally from New Zealand, Mihi is from the iwi of Te Rarawa. Since joining Roe Legal Services she has successfully led the development and implementation of the Banjima Benefits Management Structures, and assisted in the finalisation of claim wide agreements with BHPBIO and Rio Tinto. Mihi now works closely with Banjima Native Title Aboriginal Corporation RNTBC on the implementation of those agreements. Roe Legal Services congratulates Mihi on her appointment.

### Negotiating Future Act Agreements in an Economic Downturn

Negotiating Future Act Agreements in an economic downturn can be difficult for Traditional Owner Groups (Prescribed Body Corporates or Claim Groups). The economic environment can largely impact upon the negotiations, particularly commercial issues such as the quantum of benefits payable, the timing of financial benefits, the timeframes for negotiation, and heritage related payments.

Roe Legal Services can provide tailored assistance to Traditional Owner Groups throughout the negotiation process, from the objection stage all the way through to finalisation (including authorisation) and assistance with any necessary Prescribed Body Corporate certification.

### Roe Legal Services involved in finalisation of Claim Wide Agreement

The Roe Legal Services' Native Title Team was recently involved in the finalisation of a major Claim Wide Agreement for a Traditional Owner Group in the Pilbara. The negotiations were complex and took a number of years to finalise. The Claim Wide Agreement will deliver significant financial and non-financial benefits which will be managed by a Benefits Management Structure specifically designed for the Traditional Owner Group.

### New Staff at Roe Legal Services

Roe Legal Services would like to welcome Kelsi Forrest, who has joined the Native Title Team at Roe Legal Services as a Law Clerk. Kelsi Forrest is in her final year at UWA studying law, politics and indigenous studies. Kelsi is a Whadjuk, Barladong Mineng Noongar woman and has a strong interest in Native Title.

### Contacts



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